

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB

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PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ocusoft, Inc.

Serial No. 76378707

Jo Katherine D'Ambrosio of D'Ambrosio & Associates,
P.L.L.C. for Ocusoft, Inc.

Julia Hardy Cofield, Trademark Examining Attorney, Law
Office 108 (Andrew Lawrence, Managing Attorney).

Before Seeherman, Hanak and Hairston, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by Ocusoft, Inc. to
register the mark NIGHT & DAY for "ophthalmic lubricant in
the form of gels, solutions, drops and ointments for the
eyes."¹

The trademark examining attorney has refused
registration under Section 2(e)(1) of the Trademark Act, 15

¹ Application Serial No. 76378707, filed March 6, 2002, alleging
dates of first use anywhere and first in commerce on October 1,
1997.

U.S.C. §1052(e)(1), on the ground that applicant's mark, when applied to applicant's goods, is merely descriptive of them.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs, but an oral hearing was not requested. We reverse the refusal to register.

The examining attorney maintains that applicant's mark NIGHT & DAY merely describes a feature of ophthalmic lubricants, namely, that they may be used during the night and day. In support of the refusal, the examining attorney submitted pages downloaded from applicant's website and points to the following statements concerning the involved goods:

Tears Again NIGHT & DAY Lubricant Gel in 3.5 gm tubes was the first lubricant gel to be introduced in the U.S. and the gel technology used in its formulation is patented. First and foremost gels do not blur like ointments. Since Tears Again NIGHT & DAY Lubricant Gel will not blur vision like ointments, it may be used day or night! Patients appreciate this convenience and thus patient compliance is improved.

Applicant contends that the mark sought to be registered is at most suggestive of applicant's goods. According to applicant, the mark does not in any way convey to consumers that the goods are ophthalmic lubricants that will not blur

vision. Further, applicant argues that the PTO has registered other marks that are very similar or identical to applicant's mark. Applicant submitted copies of Registration No. 2,164,131 for the mark NIGHT & DAY for decaffeinated coffee; Registration No. 1,500,933 for the mark DAY 'N NIGHT for deodorant; and Registration No. 1,438,098 for the mark NIGHT & DAY for comforter covers, pillow cases and sheets.

The test for determining whether a mark is merely descriptive is whether it immediately conveys information concerning a quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215 (CCPA 1978). It is not necessary, in order to find that a mark is merely descriptive, that the mark describe each feature of the goods or services, only that it describe a single significant quality, feature or attribute. In re Bright-Crest, Ltd., 204 USPQ 591 (TTAB 1979).

If, however, when the goods or services are encountered under a mark, a multistage reasoning process, or resort to imagination, is required in order to determine the attributes or characteristics of the product or services, the mark is suggestive rather than merely

descriptive. To the extent that there is any doubt in drawing the line of demarcation between a suggestive mark and a merely descriptive mark, such doubt is resolved in applicant's favor. In re Atavio, 25 USPQ2d 1361 (TA+TAB 1992).

There is no dispute that applicant's ophthalmic lubricant may be used during the day and at night. However, NIGHT & DAY has a double connotation or significance in that it evokes the famous Cole Porter song "Night and Day". As the Board stated in In re Computer Business Systems Group, 229 USPQ 859, 859-860 (TTAB 1985):

When a term or phrase, as applied to the goods or services in question, possesses double meaning; suggests something more than a characteristic of the goods; and functions as more than a mere description of the goods; it is not merely descriptive of the goods and may be registered under the Trademark Act. (citations omitted).

In this case, NIGHT & DAY indicates more than a mere description of a feature of applicant's ophthalmic lubricants. The immediate impression evoked by this mark prompts an association with the song "Night and Day." Even absent the song, the mark has a double connotation due to the expression "night and day" as used in, for example, "I've been working night and day." Therefore, we conclude that the mark NIGHT & DAY is not merely descriptive of applicant's

goods. See *Blisscraft of Hollywood v. United Plastics Co.*, 294 F.2d 694, 131 USPQ 55 (2d Cir. 1961) [POLY PITCHER for polyethylene pitchers also reminiscent of Molly Pitcher of Revolutionary fame]; *In re Colonial Stores, Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968) [SUGAR & SPICE for bakery products also reminiscent of nursery rhyme]; and *Ex parte Barker*, 92 USPQ 218 (Com'r Pats. 1953) [CHERRY-BERRY-BING for fruit and berry preserves made from bing cherries and loganberries also reminiscent of the song "Chiribiribin."]

To the extent that there is any doubt in this case, we have resolved that doubt in applicant's favor so as to permit publication of the mark.

Decision: The refusal to register is reversed.